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**IN THE UNITED STATES DISTRICT COURT FOR THE  
 NORTHERN DISTRICT OF CALIFORNIA  
 SAN JOSE DIVISION**

**UNITED STATES OF AMERICA,**

**Plaintiff,**

**v.**

**DOMINIC CHANG,**

**Defendant.**

**No. CR-07-00554-JF**

**GOVERNMENT'S REPLY TO  
 DEFENDANT'S SENTENCING  
 MEMORANDUM**

**DATE: July 9, 2008  
 TIME: 9:00 a.m.**

Plaintiff, United States of America, by its undersigned attorneys, submits this reply in response to Defendant's Sentencing Memorandum.

**Defendant Should Not Be Given A Sentence Below The Guidelines Range**

**A. Defendant's Assertions for Below Guidelines Sentence**

In seeking a sentence below the Guideline range, the defendant cites the collateral consequences of his indictment-losing face; the aberrant nature of this offense-good character, lack of criminal history and generosity to his customers, friends, and recent immigrants; and his ability to be a contributing member of society. Defendant's Sentencing Memorandum at page 9, lines 19-23; page 10, lines 11-12, 17; page 11, lines 8-10; page 13, lines 5-14.

**B. Aberrant Behavior**

The defendant cites his record as an father, friend and community member to support his argument that 6 years of lies and income tax evasion amounts to aberrant behavior.

1 The Guidelines recognize that a first offense may constitute a single act of truly aberrant  
2 behavior justifying a downward departure. *United States v. Dickey*, 924 F.2d 836, 838 (9<sup>th</sup> Cir.  
3 1991). The absence of prior convictions, however, is not enough to show that the act in question  
4 was single and aberrant. *United States v. Takai*, 941 F.2d 738, 743 (9<sup>th</sup> Cir. 1991). In *Dickey*,  
5 the Ninth Circuit examined the factual underpinnings of what might be called the “aberrant  
6 behavior spectrum.” *Dickey*, 924 F.2d at 839. In *United States v. Russell*, 870 F.2d 18, 20-21  
7 (1<sup>st</sup> Cir. 1989), an armored truck driver who, as a result of bank error, had a bag containing  
8 \$80,000 dumped in his lap and temporarily yielded to temptation. Shortly thereafter, he  
9 confessed and returned his share of the loot. The First Circuit held the facts warranted a finding  
10 of aberrant behavior. *United States v. Carey*, 895 F.2d 318, 325 (7<sup>th</sup> Cir. 1990), involved a  
11 defendant who had engaged in a check-kiting scheme over a period of fifteen months. The  
12 Seventh Circuit held that, unlike *Russell*, the defendant’s actions could not be characterized as  
13 aberrant behavior because they consisted of hundreds of overt acts taking place over a prolonged  
14 period of time. Certainly, three years of income tax evasion involving the failure to report and  
15 pay \$163,498 in income taxes and his numerous lies to conceal his evasion falls outside the  
16 spectrum of aberrant behavior.

17 Nor has the defendant articulated a basis for a below guidelines sentence for  
18 contributions to his family, friends, and the community. “[C]ivic, charitable, or public service;  
19 employment-related contributions; and similar *prior* good works are not ordinarily relevant in  
20 determining whether a sentence should be outside the applicable guideline range.” [emphasis  
21 added] U.S.S.G. § 5H1.11. The question that must be asked is whether the defendant’s family  
22 and civic contributions were sufficiently beyond the norm for a successful business-person. *See*,  
23 *e.g.*, *United States v. Morken*, 133 F.3d 628, 630 (8<sup>th</sup> Cir. 1998)(defendant’s activities, which  
24 consisted of advising local business owners, hiring young people, serving on a church council,  
25 and raising money for charity, were “laudable, . . . [but] neither exceptional nor out of the  
26 ordinary for someone of his income and preeminence in a small Minnesota town. . . .”); *United*  
27 *States v. Haverstat*, 22 F.3d 790, 796 (8<sup>th</sup> Cir. 1994)(holding that defendant’s charitable and  
28 volunteer activities did not make him an atypical defendant in antitrust price-fixing cases);

1 *United States v. Crouse*, 145 F.3d 786, 792 (6<sup>th</sup> Cir. 1998)(finding nine-level downward  
2 departure unsupported by defendant's civic contributions, which are not unusual for a prominent  
3 businessman).

4 The government does not mean to invalidate the defendant's good deeds. However,  
5 being a "good person," a quality indeed to be admired, does not qualify as extraordinary or  
6 exceptional civic or charitable conduct. *United States v. Serafini*, 233 F.3d 758, 773 (3d Cir.  
7 2000). The question that must be asked is whether the defendant's family and civic  
8 contributions were sufficiently beyond the norm for a successful business-person, and were  
9 sufficiently exceptional so as to take him out of "a heartland of typical cases." The government  
10 submits that the defendant has failed to make such a showing.

11 C. Collateral Consequences

12 The defendant asserts that the public humiliation and the potential loss of livelihood also  
13 constitute a basis for a below guidelines sentence. Defendant's indictment was publicized and  
14 for that reason is widely know within his community for cheating on federal income taxes. See  
15 Defendant's Exhibit B at page 3.

16 In *Koon*, the district court granted a three-level departure, based upon a combination of  
17 factors, including the fact that "petitioners would face job-termination proceedings, after which  
18 they would lose their positions as police officers, be disqualified from prospective employment  
19 in the field of law enforcement, and suffer the 'anguish and disgrace these deprivations entail.'" *Koon v. United States*, 518 U.S. 81, 89 (1996). The Ninth Circuit reviewed the departure  
20 decisions and rejected them. With respect to the three-level departure for collateral  
21 consequences, the Supreme Court agreed with the Ninth Circuit concluding:  
22

23 Although cognizant of the deference owed to the District Court, we must  
24 conclude it is not unusual for a public official who is convicted of using his  
25 government authority to violate a person's rights to lose his or her job and to be  
barred from future government employment following conviction of a serious  
crime, whether or not the crime relates to their employment.

26 *Id.* at 110.

27 Similarly, it is not unusual for business persons to lose business if indicted for income tax  
28 evasion. The collateral consequences cited by the defendant simply do not take this case outside

1 the Guidelines' heartland. *Id.* at 96.

2 D. Family Circumstances

3 The defendant cites the negative effect that incarceration will have on him and his family  
4 for downward departure.

5 While some the sentencing courts have granted downward departures based on  
6 extraordinary family responsibilities and the impact of the sentence on innocent family members,  
7 easily as many cases stand for the opposite proposition, often in instances where the impact was  
8 more severe, than it is here. *See, e.g., United States v. Sweeting*, 213 F.3d 95, 101-02 (3d Cir.  
9 2000)(reversing downward departure for defendant who was the mother of five children between  
10 ages 5 and 14, and had one son who suffered from a neurological disorder); *United States v. Guy*,  
11 174 F.3d 859, 860-61 (7<sup>th</sup> Cir. 1999)(refusing to review district court decision not to grant  
12 downward departure where defendant had 1 ½ year old child, was pregnant with another, and  
13 was the caregiver for two step-children); *United States v. Leandre*, 132 F.3d 796, 807-08 (D.C,  
14 Cir. 1998) (upholding decision not to depart for extraordinary family responsibilities where  
15 defendant was a single father and his two children might be placed in foster care); *United States*  
16 *v. Archuleta*, 128 F.3d 1446, 1451 (10<sup>th</sup> Cir. 1997)(reversing downward departure for family  
17 responsibilities where defendant was the sole support for two children and cared for diabetic  
18 mother, and there was no one else to care for these dependents); *United States v. Rodriguez-*  
19 *Velarde*, 127 F.3d 966, 968-69 (10<sup>th</sup> Cir. 1997)(reversing departure where, shortly after  
20 defendant's arrest, wife was killed in automobile accident, leaving children aged 6, 8, and 11  
21 effectively orphaned); *United States v. Carter*, 122 F.3d 469, 474 (7<sup>th</sup> Cir. 1997)(upholding  
22 district court's refusal to grant downward departure from 168-month sentence where family life  
23 with wife and three children would suffer greatly due to the length of incarceration). *Also see*  
24 *United States v. Rodriguez-Velarde*, 127 F.3d at 969, and *United States v. Galante*, 111 F.3d  
25 1029, 1038-1039 (2d Cir. 1997)(dissent) both citing cases in which family circumstances did not  
26 qualify as exceptional, and therefore as grounds for downward departure.

27 The common thread running through all these cases was succinctly articulated by the  
28 Tenth Circuit in *Archuleta*, 128 F.3d at 1452. That is, the "Guidelines are clear that in this most

1 difficult and justifiably sympathy-evoking area, courts should depart downward only in rare  
2 circumstances.” The courts universally recognize that the imposition of a prison sentence  
3 normally disrupts family and parental relationships, and that in many, many instances, children  
4 are the innocent victims who end up suffering the most hardship. Unfortunately, such results are  
5 not uncommon, and do not render a case outside the heartland, as described under the Guidelines  
6 and *Koon*.

7 While the defendant’s indictment has been a strain on him, his family and friends there is  
8 nothing exceptional here to distinguish the instant case from that of all others. In fact this  
9 defendant’s family will suffer less hardship than most as the defendant is divorced and his  
10 children are self reliant adults living on the east coast. Accordingly, a significant term in  
11 custody will not be a hardship to them.

12 E. Conclusion

13 Criminal tax prosecutions play a vital role in our nation’s tax system because our system  
14 of self-reported tax liability depends upon citizens’ being assured that those who do not honestly  
15 report their income and pay their taxes will be appropriately punished. Because Dominic Chang  
16 is a well known tax cheat within his community, this Court should hold him accountable for his  
17 crimes so that his community will understand that compliance with tax laws must be taken  
18 seriously and that evasion of tax laws results in consequences more serious than mere loss of  
19 face.

20 Respectfully submitted,

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23 /s/

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26 Tax Division  
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